LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 21 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, ~~1952~~ 1953

No. ~~715~~ 39

ANTHONY WILKO,

Petitioner,

against

JOSEPH E. SWAN, *et al.,*
individually and doing business under the firm name and style of Hayden, Stone & Co.,

Defendants-Respondents,

and

HAVEN B. PAGE,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS JOSEPH E. SWAN, ET AL. IN OPPOSITION

LEONARD P. MOORE,
25 Broadway,
New York 4, New York,
Attorney for Respondents.

EDWIN C. HOYT, JR.,
FRANCIS E. KOCH,
ALAN S. KULLER,
of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
I. The case is not ripe for review	6
II. The decision below was correct	8
III. There is no conflict of decision	15
CONCLUSION	16
APPENDIX A	17

TABLE OF AUTHORITIES

CASES

Agostini Bros. Bldg. Corp. v. United States, 142 F. 2d 854 (4 Cir. 1944)	10, 11
Brown v. Allen, 344 U. S. 443 (1953)	6
Campbell v. American Fabrics Co., 168 F. 2d 959 (2 Cir. 1948)	13

PAGE

Columbian Fuel Corp. v. United Fuel Gas Co., 72 F. Supp. 843 (S. D. W. Va. 1947), aff'd, 165 F. 2d 746 (4 Cir. 1948) 13

Czarnikow v. Roth, Schmidt & Co., [1922] 2 K. B. 478 13

Donahue v. Susquehanna Collieries Co., 138 F. 2d 3 (3 Cir. 1943) 10, 11

Evans v. Hudson Coal Co., 165 F. 2d 970 (3 Cir. 1948) 13

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251 (1916) 7

House v. Mayo, 324 U. S. 42 (1945) 6

Jager v. Tolme, [1916] 1 K. B. 939 13

In re Konvitz (McCosker-Hershfield Cardiac Home, Inc.), 129 N. Y. L. J. 1639, col. 8 (Sup. Ct. May 15, 1953) 17

Lipschutz v. Gutwirth, 304 N. Y. 58, 106 N. E. 2d 8 (1952) 12

Murray Oil Products Co. v. Mitsui & Co., 146 F. 2d 381 (2d Cir. 1944) 11

Petrol Corporation v. Groupement d'Achat des Carburants, 84 F. Supp. 446 (S. D. N. Y. 1949) 12

Sargant v. Monroe, 268 App. Div. 123, 49 N. Y. S 2d 546 (1st Dep't 1944) 13

Sargant v. Monroe, 268 App. Div. 755 (1st Dep't 1944) 13

Matter of Springs Cotton Mills (Buster Boy Suit Co.), 275 App. Div. 196, 88 N. Y. S. 2d 295 (1st Dep't), aff'd, 300 N. Y. 586, 89 N. E. 2d 877 (1949) 14

PAGE

Stathatos v. Arnold Bernstein S. S. Corp., 202 F. 2d 525 (2 Cir. 1953) 7, 12

Stotesbury v. Turner, [1943] K. B. 370 13

Tarello v. John A. Johnson Contracting Corp., 50 N. Y. S. 2d 212 (not officially reported) (Sup. Ct.), aff'd, 268 App. Div. 893, 51 N. Y. S. 2d 87, leave to appeal denied, 268 App. Div. 903, 51 N. Y. S. 2d 640 (1st Dep't 1944), 294 N. Y. 646, 58 N. E. 2d 523 (1945) 14

Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391 (6 Cir. 1911) 14

Watkins v. Hudson Coal Co., 151 F. 2d 311 (3 Cir. 1945), cert. denied, 327 U. S. 777 (1946) 10, 14

STATUTES

Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. §§201-219 10

Federal Arbitration Act, 61 Stat. 669, 9 U. S. C. §§1-14

Sec. 3, 61 Stat. 670, 9 U. S. C. §3 4

Sec. 10, 61 Stat. 672, 9 U. S. C. §10 ..... 2, 5, 12

Miller Act, 49 Stat. 793, 40 U. S. C. §§270a-270d 10

Sec. 2, 49 Stat. 794, 40 U. S. C. §270b 11

Securities Act of 1933, 48 Stat. 74, 15 U. S. C. §§77a-77aa

Sec. 12(2), 48 Stat. 84, 15 U. S. C. §771(2) .. 2, 3, 5, 7, 8, 10, 11, 12, 15

Sec. 14, 48 Stat. 84, 15 U. S. C. §77n 2, 10, 15

Other Authorities

PAGE

Commercial Arbitration Rules of the American Arbitration Association (as amended and in effect January 1, 1952)

Rules 11-19 13

Rule 11 13

Rule 18 13

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951) 7

Sturges, Address before the Association of the Bar of the City of New York, (74 Reports, Association of the Bar, 1941) 14

IN THE

Supreme Court of the United States

October Term, 1952

No. 715

ANTHONY WILKO,

Petitioner,

against

JOSEPH E. SWAN, *et al.*,

individually and doing business under the firm name and style of Hayden, Stone & Co.,

Defendants-Respondents,

and

HAVEN B. PAGE,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS JOSEPH E. SWAN, ET AL. IN OPPOSITION

Opinions Below

The opinion of the United States District Court (23-32)* is reported in 107 F. Supp. 75. The opinion of the

---

* Unless otherwise stated, references in parentheses are to pages of the record.

United States Court of Appeals for the Second Circuit (40-52) is reported in 201 F. 2d 439.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition and the brief of the *amicus curiae*.

Question Presented

In a civil action for damages allegedly suffered because of misrepresentations in the sale of securities, brought under section 12(2) of the Securities Act of 1933, 15 U. S. C. §77*l*(2), was it error, because of section 14 of the Securities Act, 15 U. S. C. §77n, for the Court of Appeals to direct the enforcement of an agreement between the purchaser and seller of the securities for arbitration of the controversy, where the arbitration agreement was subject to the Securities Act, and the failure of the arbitrators to decide in accordance with section 12(2) of the Securities Act would be grounds for vacating the arbitration award pursuant to section 10 of the Federal Arbitration Act, 9 U. S. C. §10?

It is respectfully submitted that petitioner's questions present issues which are not in the case at all and that the questions presented by petitioner and *amicus* are based upon incorrect assumptions as to the procedure to be followed by arbitrators.

Statutes Involved

The pertinent provisions of the Federal Arbitration Act and the Securities Act of 1933 are set forth in the brief of the *amicus curiae* at pp. 3-5.

Statement of the Case

Petitioner is a citizen of the state of New York (2). Respondents are a partnership doing business in New York under the name Hayden, Stone & Co. (7). They are stockbrokers and dealers in securities and with reference to the transactions herein are subject to the Securities Act of 1933.

Petitioner brought suit against respondents* for damages of $3,888.88 under section 12(2) of the Securities Act of 1933. His complaint (2-4) alleges in substance that on or about January 17, 1951, respondents sold to petitioner 1,600 shares of the common stock of Air Associates, Incorporated, a New Jersey corporation, and that petitioner paid respondent $29,517.54 therefor. The complaint further alleges that said sale was made by means of certain instrumentalities of transportation and communication in interstate commerce and that it

> "was made by means of communications by the defendants to the plaintiff which were and, which included untrue statements of material facts and omitted to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading" (Par. FIFTH; 3).

The complaint further alleges that petitioner did not know that the alleged statements were untrue at the time of his purchase of the stock and petitioner sold the stock on or about February 2 and 3, 1951 (less than three weeks after the purchase) for $25,628.61, at a loss of $3,888.88.

---

* Petitioner joined as a defendant Haven B. Page, who is not involved in any of the questions presented by the petition herein.

The relationship between petitioner and respondent was controlled by the terms and conditions of Margin Agreements duly executed by petitioner dated May 2, 1950 and January 18, 1951 (8-9). The agreement of May 2, 1950 opened a joint account on behalf of Anthony Wilko and Mary Wilko (16). The agreement of January 18, 1951 opened a separate account in the name of Anthony Wilko alone (22). The agreements were otherwise identical (43 n. 4). The transaction which is the subject of the complaint in this action took place on January 17, 1951 and was on behalf of the joint account. The last paragraph of these agreements, which was directly above the place for petitioner's signature and was in the same size type as the rest of the agreement, provided:

> "Any controversy arising between us under this contract shall be determined by arbitration pursuant to the Arbitration Law of the State of New York, and under the rules of either the Arbitration Committee of the Chamber of Commerce of the State of York, or of the American Arbitration Association, or of the Arbitration Committee of the New York Stock Exchange or such other Exchange as may have jurisdiction over the matter in dispute, as I may elect. Any arbitration hereunder shall be before at least three arbitrators" (16, 22).

The Court of Appeals noted that petitioner made no claim of "fraud or coercion in procuring his signature to the agreement" (44).

Before answering the complaint respondents moved (5-6), pursuant to section 3 of the Federal Arbitration Act, 9 U. S. C. §3, for an order staying all proceedings in the

action until an arbitration had been had in accordance with the arbitration provision of the margin agreement quoted above. Respondents' motion was made upon the complaint, the affidavit of Sherman M. Bijur, a partner of Hayden, Stone & Co. (7-10), and copies of the margin agreements involved (11-22). These constituted the whole record; petitioner submitted no opposing affidavit (43).

The District Court denied the motion, because it did not "feel that arbitration of the issues at bar is consistent with the policy and language as expressed by Congress in the Securities Act" (32).

The Court of Appeals for the Second Circuit reversed (Judge Clark dissenting). Chief Judge Swan wrote an opinion, in which Judge Chase concurred, holding that "we do not find in the purpose or in the language of the statute, any policy argument strong enough to override the policy of the Arbitration Act" (49). The court also held that the margin agreement was subject to the Securities Act of 1933 and "consequently the arbitrators are bound to decide in accordance with the provisions of section 12(2)" and that "Failure to do so would . . . constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act, 9 U. S. C. A. §10" (48, 49).

To review this interlocutory order, petitioner filed this petition for certiorari.

ARGUMENT

The decision below is a sound and carefully reasoned accommodation of the purposes and policies of two federal

statutes. Without attempting to follow the procedure directed by the Court of Appeals, petitioner, joined by the Securities and Exchange Commission, urges this court to consider and reject it because of speculative fears of what might otherwise happen.

Respondents believe these fears are groundless and that the Court of Appeals gave full effect to both the Securities Act and the Federal Arbitration Act.

Respondents further believe that the procedure directed by the Court of Appeals will result in a prompt, fair and inexpensive trial on the merits and that review by this court of the interlocutory decision of the Court of Appeals before final judgment is entered after completion of the proceedings below would be premature.

I

The Case Is Not Ripe for Review

The decision below was interlocutory (43), and did not in any way determine the right of petitioner to recover the damages alleged in the complaint. Rather, the decision directed that the controversy be tried in the forum agreed upon by the parties, *i.e.*, arbitration. If this court denies certiorari at this time, petitioner may speedily obtain a trial and decision before arbitrators, and if he is successful, the questions now presented will be moot. If he is unsuccessful on the merits, petitioner may then seek review by this court, for the denial of certiorari is not, of course, equivalent to an affirmance of the decision below, *Brown* v. *Allen*, 344 U. S. 443, 488, 491 (1953); *House* v. *Mayo*, 324

U. S. 42, 48 (1945), and on certiorari from the final judgment this court may review the interlocutory order directing arbitration.* *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258-9 (1916); Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* 233-34 (1951). Cf. *Stathatos* v. *Arnold Bernstein S. S. Corp.*, 202 F. 2d 525, 528 (2 Cir. 1953).

Under the circumstances of this case it is especially preferable to postpone review until the proceedings ripen into a final judgment after arbitration.

The Court of Appeals held that the purposes and policies of both of those acts could best be secured by enforcing the arbitration agreement and by requiring the arbitrators to decide in accordance with the provisions of section 12(2) of the Securities Act (49).

Petitioner and the SEC, as *amicus curiae*, maintain that the procedure directed by the Court of Appeals will not accommodate these two statutory schemes, but will subvert the purposes and policies of the Securities Act. Thus, petitioner contends that the decision below constitutes a "long step backward in the enforcement of federal statutes; back to the days before 1933 when the 'lambs' were shorn regularly and continuously by the 'wolves' of Wall Street" (Petition, p. 17). The *amicus* alleges that "arbitration cannot assure the customer of the equivalent of his statu-

* Because of the calendar congestion both in the state courts and the federal court in New York City (47), this controversy may be arbitrated, the arbitration award reviewed by the District Court and Court of Appeals, and certiorari thereafter sought, all before there would be any possibility of the case's being reached for trial in ordinary course, if there were no arbitration provision.

tory rights" (Brief, p. 10) and speculates at length as to the possible pitfalls in the arbitration procedure directed by the decision below.

Actually, both the petitioner and *amicus* call upon this court to make a guess that arbitration under the conditions specified by the Court of Appeals will not safeguard the rights granted petitioner by section 12(2) of the Securities Act. But why guess at this time, when it is possible actually to see the arbitration procedure in action and then, if necessary, decide as to its propriety?

Granted all that petitioner and *amicus* say about the importance of the questions presented, it then becomes imperative that, insofar as possible, the ultimate determination of the case rests upon facts actually developed rather than fears and conjectures as to what may happen but has not happened.

II

The Decision Below Was Correct

The basic issue decided by the Court of Appeals was the enforceability of an agreement to arbitrate a controversy subject to the Securities Act. Before deciding this basic question, the Court of Appeals disposed of some preliminary problems peculiar to this case some of which petitioner evidently desires to resurrect in this court.

First, the Court of Appeals held that "In the absence of any opposing affidavit by the plaintiff charging fraud or coercion in procuring his signature to the agreement . . . we must assume that the plaintiff voluntarily entered

into the agreement and fully understood its terms" (43-44; cf. Petition, p. 5, question 1).

Second, the Court of Appeals held that paragraph three of the margin agreement which provides that all transactions "shall be subject to the provisions of the Securities Exchange Act of 1934 and *present* and future acts amendatory thereto," should be construed to include the Securities Act of 1933 (emphasis supplied), and that in any event the sale transaction would necessarily be subject to that Act (45-46). Neither petitioner nor *amicus* challenges this holding.

Third, the Court of Appeals held that the presence in the margin agreement of a concededly invalid provision purporting to exempt respondents from liability based on representations of its agents (14, 20) did "not vitiate the entire agreement" (45). This holding is not directly challenged. However, in spite of the fact that the Court of Appeals held that "no question as to [the exculpatory provision] will be submitted to the arbitrators" (48), *amicus* now contends, "There is no assurance, moreover, that lay arbitrators would not be influenced in some degree by the exculpatory provision of the margin agreement which is concededly invalid" (Brief, p. 18). This is but a revival of the ancient and now supposedly outmoded distrust of arbitration which may lie at the root of petitioner's and *amicus'* objections to the decision of the Court of Appeals.

With these three preliminary considerations disposed of, none of which requires further review by this court, the Court of Appeals turned to the basic issue in this case —the enforceability of the agreement to arbitrate.

The Court of Appeals noted that the Securities Act did not expressly prohibit referring a controversy subject to that Act to arbitration (46).* Therefore, arbitration would be barred by section 14 of the Securities Act, 15 U. S. C. §77n, only to the extent that arbitration conflicted with the "three things" (46) done by section 12(2) of the Securities Act, and the Court of Appeals correctly held there was no such conflict (46-49).

1. Section 12(2) "gives the purchaser a statutory cause of action against the seller if the purchase was induced by the seller's false or misleading statements" (46). The *amicus* concedes (Brief, p. 16 n. 9), and petitioner does not challenge, the correctness of the holding below that merely because "the suit asserts a statutory cause of action is not alone enough to preclude arbitration of the controversy" (46). Accord, *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (3 Cir. 1945), cert. denied, 327 U. S. 777 (1946); *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. 2d 854 (4 Cir. 1944); *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (3 Cir. 1943).

2. Section 12(2) provides that the purchaser "may sue in any court of competent jurisdiction" (46). The Court of Appeals held that this provision, like similar provisions in the Miller Act, 40 U. S. C. §§270a-270d, and of the Fair

---

*Cf. *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3, 6 (3 Cir. 1943) ("Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the Act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language.").

Labor Standards Act, 29 U. S. C. §§201-219, was not intended to limit the venue in which the controversy would be resolved, and that it did not bar arbitration which is "merely a form of trial, to be adopted in the action itself, in place of a trial at common law." *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383 (2 Cir. 1944). Accord, *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. 2d 854 (4 Cir. 1944);* *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3, 6 (3 Cir. 1943) ("the effect of this provision is to allow a suitor to proceed in federal court regardless of citizenship of the litigants and amount involved or to sue in a state court at his convenience").

Under the position taken by petitioner and *amicus*, a purchaser would be obligated to sue in every case, even though "There is good reason why he may prefer to seek enforcement of his statutory right to damages through the speedy remedy of arbitration rather than by the long delayed remedy of trial in the courts" (47).

3. Section 12(2) changes the common law rule as to burden of proof—"*i.e.*, if the buyer proves that he bought in reliance on a false statement by the seller or one that was misleading because of the omission to state a material fact, the seller must prove that he did not know, and in

---

* This case arose under the Miller Act which provided: "(b) *Every suit instituted under this section shall* be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed *and not elsewhere*, irrespective of the amount in controversy . . ." (40 U. S. C. §270b) [Emphasis supplied].

Despite this apparent command, the stay pending arbitration was granted.

the exercise of reasonable care could not have known, that his statement was untrue or misleading" (46).

The Court of Appeals held that "the arbitrators are bound to decide in accordance with the provisions of section 12(2)," including the burden of proof provision, and that "Failure to do so would . . . constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act, 9 U. S. C. A. §10" (49).

Petitioner and *amicus* strenuously attack this holding, going so far as to challenge the integrity and good faith of as yet unchosen arbitrators, thus again revealing their unreasoned distrust of arbitration as a means of obtaining justice. Respondents have no doubt that honest arbitrators prepared to heed the directions of the courts are available. And, of course, the District Court would not confirm an award where the arbitrators are shown to have been actually or potentially biased. See *Stathatos* v. *Arnold Bernstein S. S. Corp.*, 202 F. 2d 525, 526 (2 Cir. 1953); *Petrol Corporation* v. *Groupement d'Achat des Carburants*, 84 F. Supp. 446, 447 (S. D. N. Y. 1949); cf. *Lipschutz* v. *Gutwirth*, 304 N. Y. 58, 106 N. E. 2d 8 (1952). See also Appendix A, *infra* p. 17.

Amicus' contention (Brief, p. 18) joined in by petitioner (Petition, p. 9), that the arbitrators would be "selected by the regulated industry" and would be "laymen who would hear and decide the claim without reference to technical rules of law and procedure" is completely unsupported in fact. The arbitration clause (16, 22) itself gives petitioner (not respondents) the right to choose which rules of arbitration shall be used, including among them the

rules of the American Arbitration Association. That association maintains a panel of arbitrators, many of whom are lawyers, and the rules provide a method of selection of arbitrators from that panel by the parties to the dispute. Commercial Arbitration Rules of the American Arbitration Association, Rules 11-19 (as amended and in effect January 1, 1952).*

There is nothing inherently impossible about arbitrators following legal rules. Indeed, in England the arbitrators must decide "according to the legal rights of the parties" (48 n. 9). *Jager* v. *Tolme*, [1916] 1 K. B. 939, 953; *Czarnikow* v. *Roth, Schmidt & Co.*, [1922] 2 K. B. 478, 484; *Stotesbury* v. *Turner*, [1943] K. B. 370. For the record in an actual English arbitration, see records on appeal in *Sargant* v. *Monroe*, 268 App. Div. 123, 755, 49 N. Y. S. 2d 546 (1st Dep't 1944). Respondents know of no case in this country which holds that arbitrators may not be required, by the terms of the submission, to follow legal standards. On the contrary, there are many instances of arbitrators being required to decide in accordance with a specific statute or in accordance with a standard set forth in the submission agreement. *Campbell* v. *American Fabrics Co.*, 168 F. 2d 959, 962 (2 Cir. 1948); *Evans* v. *Hudson Coal Co.*, 165 F. 2d 970, 974 (3 Cir. 1948); *Columbian Fuel Corporation* v. *United Fuel Gas Co.*, 72 F. Supp. 843, 844-45 (S. D. W. Va. 1947), aff'd, 165 F. 2d 746 (4 Cir. 1948); *Watkins* v.

---

* Rule 11 provides that "No person shall serve as an Arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration, unless the petitioner, in writing, waive such disqualification."

Rule 18 provides that "the prospective arbitrator is requested to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial arbitrator."

Hudson Coal Co., 151 F. 2d 311, 313, 321 (3 Cir. 1945), cert. denied, 327 U. S. 777 (1946); *Toledo S. S. Co.* v. *Zenith Transp. Co.*, 184 Fed. 391, 392, 395 (6 Cir. 1911)*.

The New York courts consider it a matter of course that arbitrators must decide in accordance with law if the submission so provides. See *Matter of Springs Cotton Mills (Buster Boy Suit Co.)*, 275 App. Div. 196, 200, 88 N. Y. S. 2d 295 (1st Dep't), aff'd, 300 N. Y. 586, 89 N. E. 2d 877 (1949); cf. *Tarello* v. *John A. Johnson Contracting Corporation*, 50 N. Y. S. 2d 212 (not officially reported) (Sup. Ct.), aff'd, 268 App. Div. 893, 51 N. Y. S. 2d 87, leave to appeal denied, 268 App. Div. 903, 51 N. Y. S. 2d 640 (1st Dep't 1944), 294 N. Y. 646, 58 N. E. 2d 523 (1945).

Are the parties to be denied the benefits of their contractual agreement merely because the petitioner and *amicus* feel that the arbitrators will not follow the law? If so, is this really more than a concession that the courts are helpless in the situation? Such a concession is wholly unnecessary because section 10 of the Federal Arbitration Act affords specific protection against this possibility.

As the Court of Appeals pointed out (48), the petitioner and *amicus* relied primarily on the burden of proof provision of section 12(2) as creating a conflict with the Federal

---

* ". . . whether the arbitrator shall hear the case according to rules of the law of evidence and/or according to substantive law, depends upon the agreement of the parties; they may agree that one or more of those rules shall apply." Dean Wesley A. Sturges, address before the Association of the Bar of the City of New York (74 Reports, Association of the Bar, 1941.)

Arbitration Act which must be resolved in favor of the Securities Act because of section 14 of that Act. But this reliance is based entirely on their unfounded assertions that the arbitrators will refuse to obey the mandate of the courts to decide in accordance with the Securities Act, and that the courts will be powerless to prevent such conduct by the arbitrators.

In the light of the clearly correct holdings of the Court of Appeals that the arbitrators are bound to decide in accordance with section 12(2) of the Securities Act, and that failure to do so would require vacating the award, the main objections to the decision below evaporate. In any event, if the dire prophecies of petitioner and *amicus* prove correct, this court will have an adequate opportunity, after the entry of final judgment upon the award of the arbitrators, to consider the question.

III

There Is No Conflict of Decision

Petitioner's contention (Petition, pp. 14-15) that the decision below conflicts with five decisions of various Courts of Appeals is unsound. None of the cases cited deals with the impact of the Securities Act of 1933 upon the Federal Arbitration Act or with the power of district judges to require arbitrators to follow applicable law. The brief of the *amicus*, which is thoroughly conversant with cases arising under the Securities Act and related acts, does not allege any conflict of decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD P. MOORE,
25 Broadway,
New York 4, New York,
Attorney for Respondents.

EDWIN C. HOYT, JR.,
FRANCIS E. KOCH,
ALAN S. KULLER,
of Counsel.

APPENDIX A

A very recent instance of the exercise by a New York court of its powers to secure the selection of arbitrators free from bias is found in the following decision of Mr. Justice Steuer, sitting in New York County, which is a part of the Southern District of New York where this controversy arose, in *In re Konvitz (McCosker-Hershfield Cardiac Home, Inc.)*, 29 N. Y. L. J. 1639, col. 8 (not officially reported) (Sup. Ct. May 15, 1953):

> "This is a petition to have the court appoint an arbitrator. Petitioner had a contract of employment with respondent, a charitable organization. The contract provided for arbitration of disputes by a board of three arbitrators, one to be selected by each of the parties and the third by the two previously so selected. The parties selected their arbitrators, Petitioner objected to respondent's arbitrator on the ground that he would be biased as he is one of the trustees of respondent. Respondent refused to withdraw its choice or make any other. Its position is that the contract places no restriction on the selection of arbitrators and that the matter will be eventually determined by the third arbitrator. Respondent further points out that for this reason it made no objection to petitioner's arbitrator who would also be disqualified as he is a plaintiff in a current litigation against respondent. Respondent is wrong. Arbitrators are acting judges, not only the third one, but all of them. An arbitration should represent the honest conclusion, not necessarily unanimous, of the three—not the ability of either acting as an advocate to convince the third. By the steps taken respondent has put itself in the position of not being able to

select an arbitrator of its choice and having to accept a biased arbitrator. Despite the fact that the situation is of its own making relief will be tendered. If respondent on or before May 18, 1953, desires to nominate another arbitrator it may do so. Before the same date it may object to petitioner's arbitrator. If it still desires to stand on the position it has taken an arbitrator will be appointed for it. Final determination will be held in abeyance until further advice from the parties."